Lam Chun Wing Joe v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 45–27 OF 2010
MOHD AMIN FIRDAUS JC
12 AUGUST 2011

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking — Trafficking in dangerous drugs — Physical possession of drugs — Accused caught red-handed — Drugs found attached to body using masking tape — Whether accused had custody and control of drugs — Whether accused had requisite knowledge — Whether element of trafficking made out — Whether prima facie case established — Defence raised by accused — Whether defence story failed to raise reasonable doubt on prosecution case — Conduct of accused

The accused, a national of China residing in Hong Kong, was charged for trafficking dangerous drugs at the International Luggage Checkpoint at the Penang Bayan Lepas International Airport. The accused had custody and control over the drugs which were found strapped to both thighs, the abdominal region and the upper right side of the body below the right armpit of the accused using masking tape. The prosecution case was that the accused walked through the walkthrough machine, the accused anxiously tried to take her bag from the rapi scan and she twice prevented PW6 from scanning her thighs with a hand-held metal detector. The same thing happened while a body search was being conducted in the search room. Inside the search room, PW 7 pulled out 40 lumps of compressed heroin and monoacetylmorphines granules from the body of the accused. After the body search was over, PW7 noticed that the face of the accused was pale and frightened. The accused had even attempted to bribe PW7 with money but she had refused to take the money. The defence however submitted that the drugs were not seized from the body of the accused but were in reality taken out from a luggage belonging to the old woman, a fellow passenger also flying to Hong Kong, who had asked for the assistance of the accused to carry the luggage.

Held, sentencing the accused to death:

(1) There was the direct evidence of PW7 that all the drugs found in this case were strapped to both thighs, the abdominal region and the upper right side of the body below the right armpit of the accused using masking tape. Without even the aid of the presumed presumption under s 37(d)of the Dangerous Drugs 1952, the accused was caught red-handed to be in actual physical possession of the 786.61g of heroin and 140.1g of monoacetylmorphines totaling 926.71g. PW7 had also witnessed the

drugs being strapped to the body of the accused during the body search in the room. In addition to the direct evidence, the circumstantial evidence against the accused irresistibly points to her having custody and/or control and possession of the drugs. Thus, the prosecution had proved that the accused had custody and/or control of the drugs in question and in actual physical possession of them. This was incontrovertible evidence (see paras 67, 68 & 74).

(2) With the oval lump shapes attached to her body by masking tape, it can reasonably be inferred that the accused knew of the nature of the lumps to be drugs. Surely she ought to have felt the sensation of the lumps against the skin of her body. Nobody would be able to strap the drugs to her body against her will and the court infers that the accused willingly did it herself or that somebody did it for her. Further, the type of clothes that the accused was wearing also showed that the accused had knowledge of the drugs. The manner in which all the drugs were wrapped further revealed that the accused had known of the nature of the oval lumps that were attached to her body. If she had known that the oval lumps and their contents were not illegal, there was no reason for the accused to hide them under the clothes that she was wearing (see paras 75–77).

(3) The very fact that the drugs were strapped to her body like her own personal belongings and under her custody or/and physical control and possession while she was all alone results in the court to come to the inference that the accused had the power of disposal over them (see para 83).

(4) Any sane and experienced drug trafficker would have not brought along a bag containing drugs so openly when they were be easily detectable at the rapi scan and ran the risk of being arrested. It also defies common sense that the old woman who had asked for the assistance of the accused to carry the particular bag would have simply walked away from the accused without tagging along with the accused. Therefore the purported presence of the old woman and the bag of drugs at the airport were fabricated because the accused was caught red handed with the drugs strapped to her body which was cogent, compelling and convincing evidence. In reality, the old woman and her bag containing the drugs did not exist at all. It was a fictitious character (see paras 102–105).

[Bahasa Malaysia summary

Tertuduh, seorang warganegara China yang menetap di Hong Kong, dituduh mengedarkan dadah berbahaya di *Checkpoint* Bagasi Antarabangsa 'International Luggage Checkpoint' di Lapangan Terbang Bayan Lepas, Pulau Pinang. Tertuduh menyimpan dan mangawal dadah yang ditemui diikat di kedua-dua belah paha, bahagian abdomen dan bahagian atas di sebelah kanan badan di bawah ketiak kanan tertuduh dengan menggunakan pita pelekat. Kes

pendakwaan adalah bahawa ketika tertuduh berjalan menerusi mesin 'Walkthrough', tertuduh dengan tidak sabar-sabar cuba mengambil beg daripada imbasan rapi dan dia dua kali menghalang PW6 daripada mengimbas paha kanannya dengan pengesan logam tangan. Perkara yang sama berlaku apabila pemeriksaan badan dijalankan di bilik pemeriksaan. Di dalam bilik pemeriksaan, PW7 mengeluarkan 40 ketulan heroin padat dan ketulan-ketulan monoacetylmorphines daripada badan tertuduh. Selepas pemeriksaan badan selesai dijalankan, PW7 mendapati bahawa muka tertuduh pucat dan ketakutan. Malah, tertuduh cuba untuk merasuah PW7 dengan duit tetapi beliau enggan menerima wang tersebut. Pihak pembelaan bagaimanapun menghujah bahawa dadah tersebut tidak dirampas daripada badan tertuduh tetapi sebenarnya diambil daripada beg bagasi yang dimiliki oleh seorang wanita tua, seorang penumpang yang juga menaiki penerbangan ke Hong Kong, yang telah meminta bantuan tertuduh untuk membawa beg bagasi.

Diputuskan, menjatuhkan hukuman mati kepada tertuduh:

(1) Terdapat keterangan secara langsung PW7 bahawa kesemua dadah dijumpai di dalam kes ini diikat kepada kedua-dua belah peha, bahagian abdomen dan bahagian atas di sebelah kanan badan di bawah ketiak kanan tertuduh dengan menggunakan pita pelekat. Tanpa bantuan anggapan yang dianggap di bawah s 37(d) Dadah Berbahaya 1952, tertuduh ditangkap semasa dalam milikan fizikal sebenar 786.61g heroin dan 140.1g monoacetylmorphines berjumlah 926.71g. PW7 juga menyaksikan dadah-dadah tersebut diikat ke badan tertuduh semasa pemeriksaan badan di dalam bilik. Sebagai tambahan kepada keterangan langsung, keterangan persekitaran terhadap tertuduh tanpa dapat disangkal lagi menunjukkan dia menjaga dan/atau mengawal dan memiliki dadah-dadah tersebut. Oleh itu, pihak pendakwaan telah membuktikan bahawa tertuduh telah menjaga dan/atau mengawal dadah-dadah yang dipersoalkan dan mempunyai milikan fizikal sebenar dadah tersebut. Ini merupakan keterangan yang tidak boleh dipertikaikan (lihat perenggan 67, 68 & 74).

(2) Dengan ketulan-ketulan berbentuk bujur yang dilekatkan ke badannya dengan menggunakan pita pelekat, adalah munasabah untuk mengandaikan bahawa tertuduh tahu mengenai sifat ketulan-ketulan tersebut adalah dadah. Dia sudah pasti dapat merasai ketulan-ketulan tersebut mengenai kulit badannya. Tiada siapa yang boleh mengikat dadah-dadah tersebut ke badannya tanpa keizinannya dan mahkamah mengandaikan bahawa tertuduh secara sukarela melakukannya terhadap dirinya sendiri atau seseorang melakukannya untuknya. Malahan, jenis pakaian yang dipakai oleh tertuduh juga menunjukkan bahawa tertuduh mempunyai pengetahuan mengenai dadah-dadah tersebut. Perbuatan di mana kesemua dadah tersebut dibungkus selanjutnya menunjukkan

bahawa tertuduh mengetahui sifat ketulan-ketulan bujur yang dilekatkan pada badannya. Sekiranya beliau mengetahui bahawa ketulan-ketulan bujur dan isi kandungannya adalah tidak menyalahi undang-undang, tiada sebarang alasan untuk tertuduh menyembunyikannya di bawah pakaian yang dipakainya (lihat perenggan 75–77).

(3) Fakta bahawa dadah tersebut diikat ke badannya seperti harta benda peribadi dan di bawah jagaan atau/dan kawalan fizikal dan milikan ketika dia bersendirian mengakibatkan mahkamah membuat satu andaian bahawa tertuduh mempunyai kuasa untuk membuang dadah tersebut (lihat perenggan 83).

(4) Mana-mana pengedar dadah yang waras dan berpengalaman tidak akan membawa sebuah beg mengandungi dadah secara terbuka memandangkan ia boleh dikesan semasa imbasan rapi dan mempunyai risiko ditahan. Ia juga mencabar akal waras bahawa wanita tua yang meminta bantuan tertuduh untuk membawa beg tersebut akan terus berjalan daripada tertuduh tanpa sama-sama berjalan mengikuti tertuduh. Oleh itu kehadiran wanita tua dan beg dadah di lapangan terbang direka kerana tertuduh ditangkap semasa dadah-dadah tersebut diikat ke badannya di mana ini merupakan keterangan kukuh dan meyakinkan. Kenyataannya, wanita tua dan beg mengandungi dadah tidak wujud sama sekali. Ia merupakan watak rekaan (lihat perenggan 102–105).]

Notes

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

Cases referred to

Adekunle Johnson Oshodi v PP Tunde Apatira v PP and another appeal [1997] 3 MLJ 644, CA (refd)
Agus bin Agil v PP [2011] 4 MLJ 442; [2010] 9 CLJ 125, CA (refd)
Ah Mee v PP [1967] 1 MLJ 220, FC (refd)
Au Ah Lin v PP [1963] MLJ 365, FC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chandran a/l Paskaran v PP [2011] 3 MLJ 731; [2011] 2 CLJ 585, CA (refd)
Chu Tak Fai v PP [2006] 4 CLJ 931, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2006] 2 MLJ 197; [2006] 1 CLJ 857, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209; [1969] 1 LNS 52, FC (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)
Karam Singh v PP [1967] 2 MLJ 25, FC (refd)
Kartar Singh & Anor v Rex [1952] MLJ 85 (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mat v PP [1963] MLJ 263 (refd)
Megat Halim Megat Omar v PP [2001] 1 MLJ 259; [2009] 1 CLJ 154, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
(1) Namasiyam (2) Rajindran (3) Goh Chin Peng and, (4) Ng Ah Kiat & Ors v PP [1987] 2 MLJ 336, SC (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Ang Soon Huat [1991] 1 MLJ 1, HC (refd)
PP v Chin Hock Aun [1989] 1 MLJ 509, HC (refd)
PP v Chung Wan Li [2006] 2 MLJ 170 ; [2005] 8 CLJ 501, HC (refd)
PP v Foo Jua Eng [1966] 1 MLJ 197; [1965] 1 LNS 137 (refd)
PP v Lam San [1991] 3 MLJ 426, SC (refd)
PP v Mijan Mohd Deros [2003] 1 LNS 662 (refd)
PP v Mohamed Ali [1962] MLJ 257 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457 (refd)
PP v Peng Hock Seng [1986] CLJ 627, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16; [1971] 1 LNS 115 (refd)
PP v Tan Kim Piow [2006] 5 MLJ 409; [2006] 3 CLJ 717, CA (refd)
PP v Teh Cheng Poh [1980] 1 MLJ 251 (refd)
Razali bin Samani v PP [2011] 5 MLJ 188; [2010] 9 CLJ 714, CA (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158 (refd)
San Soo Ha v PP [1968] 1 MLJ 34 (refd)
Seena Pakkeer Mohamed & Ors v Pana Kader Merah [1896] 4 SSLR 84 (refd)
Sochima Okoye v PP [1995] 1 MLJ 538, CA (refd)
Tan Cheng Hock v Chan Thean Soo & Anor [1987] 2 MLJ 479 (refd)
Tara Singh and Others v PP [1949] MLJ 88 (refd)
Teh Hock Leong v PP [2008] 4 CLJ 764, CA (refd)
Timhar Jimdani Ong & Anor v PP [2010] 1 MLJ 775; [2010] 3 CLJ 938, CA (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), (j), 370
Evidence Act 1950 ss 8, 92, 114(g), 134, 145, 157
Criminal Procedure Code ss 180, 180(1), (2), (3), (4), 182A

Appeal from: Criminal Trial No 81–4 of 2010 (High Court, Penang)

Dev Chander a/l Rama Chandran (R Dev Chandar & Co) for the appellant.

Umma Devi a/p Loganathan (Penang State Legal Advisor Office) for the prosecution.

Mohd Amin Firdaus JC:

CHARGE

[1] The accused person aged 44 years old at the time of the commission of the offence, a national of China residing in Hong Kong, was charged with the following charge:

> Bahawa kamu pada 28hb Mac 2010, jam lebih kurang 6.35 pagi, di Checkpoint Dewan Berlepas Lapangan Terbang Antarabangsa Bayan Lepas, di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu sejumlah berat 926.71 gram (786.61 gram Heroin dan 140.1 gram Monoacetylmorphines) dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama.

PROSECUTION CASE

[2] The prosecution case basically rests on two star witnesses. On the 28 March 2010 at about 6.35am, auxiliary police Corporal ('Cpl') Noraisah bt Mugin ('PW6') was on duty at the international luggage checkpoint at the Penang Bayan Lepas International Airport ('PBLIA'). Her duty as a security assistant was to frisk women passengers embarking onto aircrafts flying overseas.

[3] That particular morning PW6 was checking female passengers boarding a Cathay Pacific flight to Hong Kong. At that moment, the accused who was also flying to Hong Kong in the same aircraft was then queuing behind a male passenger but she overtook the latter and hurriedly entered the checkpoint to take her bag from the rapi scan (X-ray luggage) located there.

[4] PW6 directed the accused by hand language to return to the queue and wait for her turn in which she obeyed. After the male passenger was checked, PW6 began to frisk the body of the accused with a hand-held metal detector and when it reached below her thighs, the accused tried twice to push away the metal detector with her hand and refused to be searched. She had also used her hands to search the body of the accused. PW6 then immediately detained the accused whose face looked panicky (*kelam kabut*) and informed her superior officer auxiliary police Sergeant ('Sgt') Norshan bt Md Zain ('PW7') who happened to pass by about the accused. PW6 was with the accused for only about 2 to 3 minutes. After the incident was over, PW6 resumed her usual duty.

[5] PW7 testified that on the 28 March 2010 at about 6.35am she happened to be at this luggage checkpoint and was informed by PW6 that a Chinese woman passenger, that is the accused, refused to cooperate with her in allowing her body to be searched. PW6 sought help from PW7 and at that time the latter saw the accused standing near PW6.

[6] PW7 found out that the accused is a national from China using a Hong Kong passport. Her name is Lam Chun Wing Joe. She also rummaged her handbag but found nothing incriminating except her personal belongings.

[7] PW7 together with another auxiliary police Sgt Noraini bt Yahaya then coaxed the accused to submit to a body search in a room located next to the checkpoint. PW7 said that when PW6 handed over the accused to her, the accused looked frightened and her behaviour was suspicious.

[8] PW7 further said that during the handover, she saw the accused wore a black loose gown until the knee level and a black cardigan on top of it. PW6 also handed over to her a white handbag.

[9] Inside the search room, only PW7, Sgt Noraini and the accused were present. PW7 introduced herself to the accused as a security assistant and told her that she wanted to conduct a body search on her. The accused refused and evaded to be frisked by PW7.

[10] Next PW7 asked the accused to remove the black cardigan but the former said that it took some time spanning five to ten minutes in order for her to finally persuade the accused to remove it who then put the cardigan on the table. PW7 then saw the accused was wearing a sleeveless black gown reaching the knees and a tight brown bodysuit inside it.

[11] Again PW7 tried to search her body but the accused still refused to give her cooperation and was evasive. Eventually PW7 forcefully frisked her body and when she held her thigh, she felt lumps like oval shape. She lifted up her black gown and saw that the accused was also wearing a brown bodysuit. At a glance, PW7 saw oval lump shapes protruding from both thighs of the accused.

[12] PW7 requested the accused to remove her bodysuit but she refused to do so. PW7 then forcefully put her hand into the right trouser of the bodysuit and she felt tape on the right thigh of the accused. PW7 pulled out one set of five lumps with shapes as seen in the photographs exhs P4(A-J). They were actually compressed granules of heroin and monoacetylmorphines as confirmed by the chemist Sukhairi bin Samsudin ('PW4') after analysis had been carried out.

[13] Each lump of compressed granular heroin and monoacetylmorphines was wrapped with transparent plastic and all the lumps were held together by masking tape. All together she pulled out eight sets and there were five lumps containing compressed granular heroin and monoacetylmorphines in each set. All the 40 lumps of compressed heroin and monoacetylmorphines granules were wrapped up with transparent plastic enclosed with masking tape.

[14] PW7 inserted her hand into the left trouser of the bodysuit and pulled out a total of six similar sets, each set containing five such lumps. All lumps were wrapped up with transparent plastic and held together by masking tape. She further pulled out two sets from the left thigh with each set holding six lumps. Altogether there were 42 lumps of compressed heroin and monoacetylmorphines granules strapped onto the left thigh with tape.

[15] After this, she moved her hand all over the left thigh of the accused and felt that there was nothing more there. The accused herself saw what PW7 was doing all this while.

[16] Next PW7 lifted up the black gown that the accused was donning to the belly level and again saw lump shapes protruding from the abdominal region. At that time she saw the tight bodysuit that the accused was wearing had a 'V' shape opening from the neck until the belly. PW7 put her hand into the abdominal region and felt lumps wrapped up with tissue papers. There were two tissue packages and each package contained six lumps all shaped as seen in the photographs exhs P4E, F and H. All the lumps of compressed heroin and monoacetylmorphines granules were wrapped in transparent plastic held together by tape.

[17] PW7 also saw a bigger lump in oval shape of compressed granular heroin and monoacetylmorphines wrapped in transparent plastic on the right side of the upper body of the accused near her armpit as seen in photograph exh P4G.

[18] PW7 suspected all the lumps in oval shape to be dangerous drugs and told the accused about the offence and then detained her for further investigation.

[19] All the lumps of compressed heroin and monoacetylmorphines granules as found by the chemist PW4 after analysis totalled 786.61g of heroin and 140.1g of monoacetylmorphines.

[20] After she did not find anything incriminating more from the other part of her body, PW7 then put all the exhibits found in a red plastic container and

shown them to the accused. PW7 then informed her superior officer auxiliary police Inspector ('I') Md Sheriff bin Abu Bakar about the accused.

[21] After the body search was over, PW7 noticed that the face of the accused was pale and frightened. The accused got her handbag and took out some money and attempted to bribe PW7 who refused to take the money.

[22] PW7 next asked the accused to wear back the black cardigan that she had removed. Later I/ Md Sheriff came over to the search room and PW7 briefed him on what had happened. Following this, PW7, I/Md Sheriff and Sgt Noraini brought the accused and all the seized exhibits to the airport police station located on the ground floor of the airport building. PW7 herself carried the container containing the exhibits found on the body of the accused and she said that the accused herself carried her white handbag.

[23] At the police station, PW7 lodged Bayan Lepas Police Reports Nos 267 and 269/10 respectively. In the latter report, PW7 corrected her first police report and stated that actually there were 40 lumps and not 42 lumps strapped onto the right thigh of the accused. She also prepared the search list and marked the exhibits with her signature and the date when the exhibits were discovered. For the masking tapes she was not sure on whether she had marked them. The white handbag, a white laptop, rings, handphone, neck chains, a purse, the international passport of the accused, boarding pass and the flight ticket were among the personal belongings seized from the accused.

[24] Although items seized like the boarding pass, flight ticket, purse and the white handbag were not listed in the search list, nevertheless PW7 said that she had handed all of them over to the investigating officer I/ Thomas anak Untul ('PW9').

[25] After completing her follow up duty arising from the arrest of the accused at the airport police station, PW7 handed over the accused to I/ Balber Singh ('PW8') the narcotics officer attached to the Narcotics Division at the Penang International Bayan Lepas Airport at about 9am on the same day.

[26] PW7 and other narcotics officers then boarded a van to the Barat Daya District Police Station at Balik Pulau. She was having custody of the exhibits while on the way to the station. There she handed over the exhibits to the investigating officer (PW9).

[27] PW9 gave evidence that on the 28 March 2010 he received from PW7, the accused, all the drugs exhibits together with the personal belongings of the accused. In addition to the personal effects stated, he also received foreign

currencies like some American and Hong Kong Dollars, Macau Pataces, China Yuan and Ringgit Malaysia amounting to 150. PW9 also received the two police reports and the search list.

[28] PW9 testified that actually he seized two brown coloured bodysuits. He also said that PW7 only gave him one white handbag while one luggage was recovered from the luggage claim division located on the ground floor of the airport premises. He examined the contents of this luggage and found that it contained the clothes of the accused and nothing illegal.

[29] PW9 also carried out the other usual formal functions of an investigating officer like directing the police photographer to take photographs of the seized exhibits, the scene of the commission of the crime and packing and sealing and sending the drugs exhibits to the chemist ('PW4').

[30] In this case however the replacement investigating officer, I/ Mohd Lukman bin Abd Ghani ('PW10') took back the exhibits from the chemist and kept them under his custody. PW10 also served the chemist report on the accused in prison.

[31] After PW10 had finished testifying, the prosecution closed its case and offered thirteen witnesses to the defence.

SUBMISSIONS

Defence

Credibility of PW6 and PW7

[32] The learned defence counsel contended that although the accused was seen to be walking hurriedly yet PW6 agreed to its suggestion that she was also walking at a normal pace. PW6 said that she had made a police report in regard to this case yet later she denied it.

[33] He argued that if her report had been tendered as exhibit, it would have probably favoured the accused and the failure to do so meant that s 114(g) of the Evidence Act 1950 applies.

[34] PW6 agreed that she had brought the accused together with her handbag and a luggage containing clothes to see PW7. PW6 agreed during re-examination that she had taken this bag of clothes from the rapi scan. She admitted that there was such a bag.

[35] The testimony of PW7 concerning the time taken to persuade the accused to go into the search room from the checkpoint and asking her to remove her cardigan while inside the room was about 20 minutes which did not include the search. It was the contention that the time should be more likely to exceed one hour but photograph P38A shows 7am after the search had been carried out which is not accurate.

[36] It was put to PW7 a number of times that the drugs were found inside a bag of clothes which did not belong to the accused although she answered firmly during cross-examination that there was no such bag except for the white handbag. Exhibit photograph P38B nonetheless showed the existence of the incriminating bag.

[37] The search list (exh P42) shows this luggage but PW7 explained that it was wrongly written, hence ss 91 and 92 of the Evidence Act 1950 applies following *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220 (FC). PW7 'denied, fabricate or conceal such evidence when it is already in existence through prosecution own exhibits and through PW7 own testimony in court at the re-examination stage'.

[38] PW7 had made two statements which appeared differing in material particulars. She also did not mention about the big lump of drug that was found inside the bodysuit and the drugs discovered from the pair of tight chocolate trousers in her police report (P39). Thus her failure to do so created doubt in this aspect of her evidence.

[39] Besides, 'paper masking tape' being used as alleged would easily loose grip and resulted in the drugs falling onto the floor when the body moved. The many drugs on her body would also hinder her movements especially walking.

[40] PW7 did not mention in her police report (P39) that the accused had attempted to bribe her and thus her claim is not true. She is not a reliable witness always changing her story.

[41] Summing up the gist of the submission by learned counsel, all the drugs were not seized from her body but they were in reality taken out from a luggage not belonging to the accused and it can be seen in photograph P38B.

[42] On the morning of the incident, the accused was helping an old Hong Kong woman to carry this particular bag containing clothes where the drugs were found as the latter was then carrying two bags with her hands. As the accused and the old woman were both heading towards the same destination, the former agreed to help the latter because she appeared to be sick. The accused offered to help her out of pity.

[43] While both of them were walking towards the immigration counter, the accused received a call from Hong Kong and stopped to answer the telephone call and when she returned to the queue, it was long and the old woman was already ahead of her in front of the queue. After getting through the immigration counter the accused headed towards the checkpoint in a rush with her handbag and the bag of clothes belonging to the old woman and was directed to put both bags on the rapi scan or X-ray luggage.

[44] The accused said that while her body was being frisked, she was already asked about the luggage (belonging to the old woman) on the 'X-ray machine'. The accused then pointed her hand to the outside direction and talked in Chinese when her passport was being taken away.

[45] A quarrel then ensued between the accused and a police woman and man. The accused gave evidence that she was later handed over to another police personnel together with her handbag and the old woman's luggage.

[46] Learned counsel next drew the attention of the court to the evidence of the chemist (PW4). He argued that PW4 had failed to comply with s 370 of the Dangerous Drugs Act 1952.

[47] PW4 should have at least analysed 10% from the receptacles meaning each of the wrappers according to this provision. In this case 95 wrappers containing the drugs were seized. PW 4 only used 1.260g (15g x 84 samples from the four envelopes) as samples for the purpose of analysis whereas he should have used 164.6g from the overall weight for such analysis. Thus PW4 had not fulfilled the mandatory provision because the amount analysed was not enough.

[48] It was submitted that therefore the prosecution had failed to prove a prima facie case against the accused.

PROSECUTION

Custody and control

[49] When the accused was walking through the walkthrough machine, the accused anxiously tried to take her bag from the rapi scan and she twice prevented PW6 from scanning her thighs with a hand-held metal detector. The same thing happened while a body search was being conducted in the search room.

[50] It is impossible for all the drugs to be fastened by masking tape to the body without her knowledge.

[51] The evidence is enough to show that the accused was having custody and control over the drugs.

[52] The learned deputy public prosecutor cited *Megat Halim Megat Omar v PP* [2001] 1 MLJ 259; [2009] 1 CLJ 154 (CA), *Tunde Apatira & Ors* [2001] 1 CLJ 381, *Teh Hock Leong v Public Prosecutor* [2008] 4 CLJ 764 (CA), *Agus Agil v Public Prosecutor* [2011] 4 MLJ 442; [2010] 9 CLJ 125 and *Adekunle Johnson Oshodi v Public Prosecutor Tunde Apatira v Public Prosecutor and another appeal* [1997] 3 MLJ 644 (CA) to support her argument.

SEARCH LIST

[53] Any omission in the search list would not materially affect the case for the prosecution if the witness concerned could explain the contradiction in his testimony in court. She cited *San Soo Ha v Public Prosecutor* [1968] 1 MLJ 34, *Public Prosecutor v Chin Hock Aun* [1989] 1 MLJ 509, *Public Prosecutor v Chung Wan Li* [2006] 2 MLJ 170; [2005] 8 CLJ 501 and *Public Prosecutor v Mijan Mohd Deros* [2003] 1 LNS 662.

[54] She was replying to the contention of the defence that why did PW7 deny the existence of the luggage containing clothes where the drugs were found and stated by PW7 herself in the search list (P42).

CONDUCT OF THE ACCUSED

[55] The suspicious conduct displayed by the accused when confronted by PW6 and PW7 at the checkpoint and in the search room is admissible under s 8 of the Evidence Act 1950. The Court of Appeal Case in *Public Prosecutor v Tan Kim Piow* [2010] 1 MLJ 775; [2006] 3 CLJ 717 was cited. Per Gopal Sri Ram HMR:

> The contemporaneous conduct of the accused is relevant and admissible by virtue of s 8 of the Evidence Act 1950 … So you find the editors of Sarkar's *Law of Evidence* (15th Ed) saying this:
>
> Mere absconding by itself does not necessarily lead to a firm conclusion of a guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case.
>
> In the present case, the conduct of the accused is not to be taken in isolation but together with all the other circumstances of the case. This is the correct approach to circumstantial evidence as Thompson CJ said in *Chan Chwen Kong v Public Prosecutor* [1962] 1 LNS 22.

[56] This is especially relevant when the accused tried to bribe PW7 after the discovery of the drugs in the search room.

[57] The case of *Timhar Jimdani Ong & Anor v Public Prosecutor* [2010] 1 MLJ 775; [2010] 4 CLJ 938 (CA) was also referred to by the prosecution where the Court of Appeal observed:

> Three main features arose from the prosecution case which dealt with the conduct of the appellants to prove their guilty minds, and their knowledge of the drugs recovered in the box which was in their possession. These were:
>
> (a) the conduct of Timhar in attempting to prevent the police from entering the room which the appellants occupied;
>
> (b) the conduct of Nurie upon the discovery of the drugs when she shouted and cried in dismay the Suluk words 'they have found the things' and
>
> (c) the attempt by both appellants in trying to bribe the police.

PROBATIVE VALUE OF THE POLICE REPORT

[58] The defence had pointed out that PW7 did not state in her police report that the big oval lump containing the drugs was found below her right armpit.

[59] The prosecution referred to *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209; [1969] 1 LNS 52 which held that the first information. report is not an encyclopaedia.

[60] Finally the learned deputy prosecutor submitted that based on all the evidence led, it had proved a prima case against the accused and the accused should be called to enter her defence.

CLOSE OF THE PROSECUTION CASE

[61] At the end of the prosecution case, the court is guided by s 180(1), (2), (3) and (4) of the Criminal Procedure Code. Section 180(4) of the Code states that:

> For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[62] In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 the Court of Appeal laid down the principle of law:

> … Therefore, a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation and to ask himself the question 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the

prosecution case?' If the answer was in the negative, then no prima facie case had been made out and the accused would be entitled to an acquittal.

[63] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, the Federal Court of Appeal held that:

The test at the close of the case for the prosecution would therefore be:

'Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[64] The Federal Court in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 held:

… What is required of a Subordinate Court and the High Court under the amended sections (that is s 180 of the Criminal Procedure Code) is to call for the defence when it is satisfied that a prima facie case has been made at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence.

It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing inferences admitted by the prosecution evidence. Thus, if the prosecution admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.

[65] In *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, the Federal Court again repeated the same principle of law as enunciated in *Mohd Radzi bin Abu Bakar*'s case for the trial judge to abide when deciding whether a prima facie case has been established by the prosecution at the end of the prosecution case.

[66] It refers to *Balachandran*'s case and stated that:

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider the existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen.

On the other hand if a prima face has not been made out, it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way, the court must at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

INGREDIENTS OF THE OFFENCE

Custody/control/possession

[67] There is the direct evidence of PW7 that all the drugs found in this case were strapped to both thighs, the abdominal region and the upper right side of the body below the right armpit of the accused using masking tape. Without even the aid of the presumed presumption under s 37(d) of the Dangerous Drugs 1952 (Act 234), the accused was caught red-handed to be in actual physical possession of the 786.61g of heroin and 140.1g of monoacetylmorphines totaling 926.71g. Sgt Noraini bt Yahaya had also witnessed the drugs being strapped to the body of the accused during the body search in the room.

[68] In addition to the direct evidence, the circumstantial evidence against the accused irresistibly points to her having custody and/or control and possession of the drugs. The court is aware that 'the evidence that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all'. (*Kartar Singh & Anor v Rex* [1952] MLJ 85 (CA S'pore)).

[69] In *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25(FC), it was held by the Federal Court that:

> In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused.

[70] It is however to be noted that the prosecution in this instant case did not rely entirely on circumstantial evidence.

[71] All the drugs were fastened to her body by masking tape and based on the testimony of PW7, the accused wore a black baggy gown and a black cardigan and tight bodysuit (later the investigating officer PW9 discovered that in fact there were two bodysuits) to conceal them. *The loose gown and dark coloured clothing rather than light coloured one were obviously chosen to hide the oval lumps of drugs protruding from her body which must be conspicuous. The two tight bodysuits further acted to ensure that the strapped drugs remained firmly on the respective parts of her body.*

[72] Any normal and sensible passenger on long haul flights would have not worn such tight body suits for the discomfort caused, bearing in mind that the accused was not a first time flight passenger. She had flown to Malaysia a number of times.

[73] When the accused was nabbed, she was alone with the incriminating evidence. Scrutinising her passport, the accused had entered Malaysia through Kuala Lumpur International Airport but wanted to exit the country through Penang International Bayan Lepas Airport. Penang is a long way from Kuala Lumpur.

[74] Thus the prosecution had proved that the accused was having custody and/or control of the drugs in question and in actual physical possession of them. This is incontrovertible evidence.

Knowledge

[75] With the oval lump shapes attached to her body by masking tape, the court can reasonably infer that the accused knew of the nature of the lumps to be drugs. Surely she ought to have felt the sensation of the lumps against the skin of her body. Nobody would be able to strap the drugs to her body against her will and the court infers that the accused willingly did it herself or that somebody did it for her.

[76] To recapitulate, the type of clothes that the accused was wearing also shows that the accused had knowledge of the drugs. The manner in which all the drugs were wrapped further goes to show that the accused had known of the nature of the oval lumps that were attached to her body.

[77] If she had known that the oval lumps and their contents were not illegal, there was no reason for the accused to hide them under the clothes that she was wearing.

TRAFFICKING

[78] As the chemist Sukhari bin Shamsudin (PW4) had testified that after carrying out the relevant analysis, the drugs that were seized from the accused are heroin and monoacetylmorphines and they exceeded the statutory amount, the court finds that the presumption of trafficking under s 37(da) of the Act 234 arises.

[79] Nonetheless, the court is aware that in the cited *Mohd Radzi bin Abu Bakar*'s case, the Federal Court referred to another Federal Court case in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 (FC) and noted that the presumed possession under s 37(d) of the Act is not the 'possession' referred to in s 37(da) of the Act (Act 234). The phrase 'found in possession' in s 37(da) refers to actual possession. Hence, where the prosecution intends to rely on the presumption under s 37(da), it is necessary

for it to prove by positive evidence — and not by the presumption under s 37(d) — all the ingredients of possession in law.

[80] In the same case in *Mohd Radzi bin Abu Bakar*, the Federal Court referred to two cases to show what are the ingredients of possession in law, namely in *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54 and *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158.

[81] In the former case *Gordon Smith* Ag CJ explained 'possession' in law:

> Possession in order to incriminate a person must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of mens rea, without which (except by statute) possession cannot be criminal.

[82] In the latter case Yong J said:

> In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics, possession raises no presumption of mens rea. Without mens rea, possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

POWER OF DISPOSAL

[83] The very fact that the drugs were strapped to her body like her own personal belongings and under her custody or/and physical control and possession while she was all alone that 28 March 2010 results in the court to come to the inference that the accused had the power of disposal over them.

CREDIBILITY OF PW6 AND PW7

[84] The court does not doubt the credibility of these two main prosecution witnesses because there was no hidden agenda for both of them not to tell the truth in court. It is of significance to point out that the accused and PW6 and PW7 are complete strangers to one another. The accused is a resident of Hong Kong while both PW6 and PW7 are residing in Malaysia.

POINTS RAISED BY THE DEFENCE

[85] The court would only focus on those points which are relevant to the fact in issue.

FOUR ENVELOPES NOT SEALED

[86] Although the envelopes marked 'A', 'B', 'C', and 'D' containing all the seized drugs were not sealed with the police seal based on the chemist report (P13), nonetheless all four envelopes were put inside a card board marked 'TU1'. This card board was sealed with 'Polis Di Raja Malaysia 47'. The noteworthy point is that there was no evidence of tampering with the four envelopes. PW9 identified and confirmed that the four envelopes were initially handed over to the chemist ('PW3') Kalaivani a/p K Balachandran.

FAILURE TO CALL OTHER WITNESSES IN THE SEARCH ROOM

[87] It was also contended that the prosecution had failed to call auxiliary police Sgt 6602 Noraini bt Yahya and C/l 35649 Md Sheriff bin Abu Bakar who were with the accused in the search room while the search was being conducted. 'Two more persons' who had helped to escort the accused to the police station at the airport were also not called as witnesses.

[88] Although not stated specifically, it meant that s 114(g) of the Evidence Act 1950 applies. It was not necessary to call Sgt Noraini to testify as PW6 had already been called. C/I Md Sheriff was not present during the whole search, he only came to the room after having being informed by PW7. Thus his evidence would have served no purpose because by the time of his arrival, the search had already ended. The 'other two persons' who also escorted the accused to the airport police station were actually Sgt Noraini and C/I Md Sheriff as seen in exhibit photograph P 38A.

[89] The prosecution did not suppress the presence of these two witnesses. Anyway both of them were offered to the defence. The court finds that the adverse presumption does not arise because there is sufficient evidence in support of the prosecution case as based on the principle of law laid down in *(1) Namasiyam, (2) Rajindran, (3) Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 (SC).

[90] Moreover s 134 of the Evidence Act 1950 provides that no particular number of witnesses shall in any case be required for the proof of any fact. This section reflects the legal maxim that evidence has to be weighed and not counted, meaning one witness, if believed, is sufficient to establish any fact. Please see *Khaw Cheng Bok & Ors v Khaw Cheng Poob & Ors* [1998] 3 MLJ 457.

BAG CONTAINING DRUGS

[91] It was argued strongly that exhibit photograph P38B clearly shows that

A the accused was carrying the incriminating bag containing the drugs belonging to an old woman whom she had given help. PW7 denied that there was such a luggage.

B **[92]** The testimony of PW7 is that at all material time when she confronted the accused at the international luggage checkpoint and later when she searched the accused in the search room, the 'square bag containing clothing' as claimed was nowhere to be seen. The investigating officer (PW9) had categorically said that based on his investigation no such bag of clothing existed and that the drugs seized were never discovered inside such a bag as purportedly C claimed.

[93] PW9 also testified that PW7 only handed over to him a white hand bag and one other bag ('P53') containing the clothing of the accused which he had taken from the luggage department located on the ground premises of the D airport.

[94] To be fair to the accused photograph P38B does show that the accused was also carrying another bag exh P53 which the defence denied was her bag. The court had looked into the contents of the bag and found that it contained E a towel, tissue papers and other personal belongings of a woman which belonged to the accused. The accused was in reality carrying this bag (P53). When P53 was produced as an exhibit in court, the accused said that it was not her bag.

F

[95] The investigating officer PW9 had given evidence that he had taken P53 from the luggage department being guided by the electronic flight ticket of the accused and there was only this bag belonging to the accused, no other bag. The defence had queried why PW7 had denied the existence of 'the luggage G containing clothes' when photograph P38B clearly shows it. The bag in question actually is P53 to risk repetition.

[96] The issue relating to the purported bag of clothes containing the incriminating drugs and belonging to the old woman, a fellow passenger who H was also flying to Hong Kong is the underlying basis of the defence for the accused.

[97] After making a maximum evaluation of all the evidence adduced by the prosecution and observing especially the demeanour of their main witnesses I PW6 and PW7 in the witness box, the court verily believes that the story about the old woman asking help from the accused to carry her bag which contained the drugs for her is not true at all and was cooked up.

[98] Incidentally, the court is aware that in making a finding on credibility,

the demeanour of the two witnesses must be balanced against the rest of the evidence and the probabilities of the case. See *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 and *Tara Singh and Others v Public Prosecutor* [1949] MLJ 88.

[99] The court now makes an analysis on why the story was made up. Assuming for a moment the claim by the accused that the old woman at the airport is true, it is common knowledge among passengers travelling by air that one is only allowed to take one standard sized baggage not exceeding 20 kilogram onto the aircraft. Here the old woman that the accused claimed to be present at the airport *was carrying two bags and if including the bag that she gave to the accused, there were altogether three bags!* Most probably all the three bags would have exceeded the 20 kilogram limit.

[100] *Surely apart from the bag said to be given to the accused, the other two bags must be sizable enough to weigh down the old woman resulting in her asking for help from the accused to carry the incriminating bag.* Therefore in all likelihood the old woman would have been barred from taking all the three bags onto the aircraft.

[101] If the old woman were ignorant about the requirement, when she checked in at the airport counter, the staff on duty would have told her about it.

[102] Next any sane and experienced drug trafficker would have not brought along a bag containing drugs so openly when they were be easily detectable at the rapi scan and ran the risk of being arrested.

[103] It also defies common sense that the old woman who had asked for the assistance of the accused to carry the particular bag would have simply walked away from the accused without tagging along with the accused.

[104] If the old woman had known of the drugs inside the bag and thus wished to distance herself away from the accused until the bag was safely cleared at the luggage checkpoint before taking it back from the accused, then when the drugs were discovered inside this bag at the checkpoint as claimed, the accused could have easily shoved her way into the departure hall to show with her finger towards the old woman to PW6 who would probably be hanging around as the aircraft to Hong Kong had still not departed yet. In such a situation when the accused was faced with a serious charge involving dangerous drugs, regard being to ordinary human conduct, the accused if innocent, ought to have reacted in this manner even if there was language barrier or other obstacles.

[105] Therefore the purported presence of the old woman and the bag of drugs at the airport were fabricated because the accused was caught red handed with the drugs strapped to her body which was cogent, compelling and convincing evidence. In reality, the old woman and her bag containing the drugs did not exist at all. It was a fictitious character.

[106] The accused did not even give a brief description of 'the old woman' like her face, physique and the clothes she was wearing at the PBLIA to convince the court except the bare assertion of 'an old woman'.

[107] There was no reason for PW6 and PW7 to lie in court looking at the facts and surrounding circumstances of the case. As mentioned earlier, both PW6 and PW7 did not know the accused at all and her arrest was not even based on information, *they only stumbled across the drugs in question.*

CONTRADICTIONS IN THE TESTIMONIES PW6 AND PW7

[108] PW6 said that the accused hurriedly took 'beg pakaian' from the rapi scan. This assertion is contrary to the overwhelming evidence led when PW6 testified and throughout her testimony she only mentioned 'bag' and not a bag containing clothes. In fact the learned defence counsel himself at the beginning also cross-examined on the issue of bag only. It was later in another twist that he put the following question regarding this purported bag to PW6:

> Awak telah tanya OKT mengenai bag pakaian itu, setuju?

[109] PW6 replied 'Tidak setuju'. With due respect to the learned defence counsel, this line of his defence had been taken out of context.

[110] It was also argued that PW6 had admitted making a police report in connection with this case but later denied making it. There was no reason for PW6 to lie because she was not the complainant and is only a low ranking officer.

[111] On the other hand assuming even if she had lodged such a report, the cited Federal Court case in *Balachandran v Public Prosecutor* held that the evidentiary value of a first information report functions to contradict the testimony of a witness under s 145 of the Evidence Act 1950 or to corroborate his testimony under s 157 of the same Act. It is not a piece of substantive evidence.

[112] Hence this is not a material document in the strict sense of the word. Anyway there was no suppression of evidence for the simple reason that it was never made.

[113] The court would like to refute that never at material time PW6 had ever admitted that she 'telah membawa OKT bersama-sama beg pakaian dan beg tangan berjumpa seorang anggota polis lain (PW7)'. The notes of evidence do not have such record.

[114] In *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251, the High Court held that a police witness is not an interested witness but a public officer performing his duty.

[115] In *Seena Pakkeer Mohamed & Ors v Pana Kader Merah* [1896] 4 SSLR 84 Straits Settlement Law Rpt Vol 4 1897, it was even held that there is no general rule that if some witnesses called for the prosecution are contradicted on material points by other witnesses called for the prosecution, the accused should never be convicted.

NO UNDERSTANDING OF THE ENGLISH LANGUAGE

[116] *PW7 testified that she had communicated with the accused in simple English language which the accused understood.* The court does not doubt her credibility when carrying out a maximum evaluation of the overall evidence adduced by the prosecution. For instance, looking at her Hong Kong passport (P43) the accused had also flown to United Arab Emirates once. She had also signed the search list (P41) as 'Lam' in the English alphabets and not in Mandarin characters. At the least the accused should have a smattering of the English language to equip her for travelling all alone to Malaysia or even to United Arab Emirates, not forgetting that Hong Kong was once the colony of the United Kingdom where usually the English language is still widely being used.

[117] The court does not believe that the accused is completely ignorant of the English language.

CHEMIST ANALYSIS

[118] The learned defence counsel contended that the chemist (PW4) had not complied with s 37(j) of the Dangerous Drugs Act 1952 (Act 234). To avoid needless repetition, his argument will not be repeated here, it is suffice to say that the court finds that PW4 had taken enough samples for analysis.

[119] Assuming even if there were error, the statutory amount is only 15g or more in weight for heroin and monoacetylmorphines for the act of trafficking whereas in this case the accused was charged with trafficking in 786.61g of heroin and 140.1g of monoacetylmorphines, a substantial amount for each of the drug type.

[120] In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 and *Public Prosecutor v Lam San* [1991] 3 MLJ 426, both the Supreme Court cases held:

> … in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step. See *Balachandran v Public Prosecutor* [2005] 1 CLJ 85(FC).

[121] In this case, the accused did not call another chemist to challenge the findings of PW4. See *Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1.

[122] In *Au Ah Lin v Public Prosecutor* [1963] MLJ 365, the Federal Court held that:

> The s (37j) does not require the taking of any particular quantity. The words 'ten per centum' refer to the packages, not to the contents of each package.

[123] In *Chu Tak Fai v Public Prosecutor* [2006] 4 CLJ 931, the Federal Court held:

> … In any event, the ten per centum stipulated in s 37(j) refer to the number of receptacles and not the total weight of the drug found or the total amount or weight of the samples taken for analysis.

[124] Section 37(j) only requires the taking of samples from ten per centum of the total number of the receptacles and not the drug.

[125] In the Federal Court case in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197; [2006] 1 CLJ 857, it held:

> It is clear therefore (that is s 37 Q) of the Dangerous Drugs Act 1952) that there is no requirement for the amount or the weight of the samples of the drug to be taken for the purpose of analysis by the chemist. It is up to the chemist to carry out the analysis scientifically. It is also for the chemist to determine the adequacy of samples for the purpose of analysis. If the defence wishes to challenge the sufficiency of the weight of the drug analysed, the chemist's evidence must be challenged and evidence in rebuttal must be led, if necessary.

PRIMA FACIE CASE

[126] For the reasons stated above, the court finds that the prosecution had proved a prima facie case against the accused and called for her defence.

[127] The accused chose to give evidence from the witness stand after the three alternatives were explained to her in the Cantonese dialect.

DEFENCE CASE

[128] The accused gave evidence that her reason in coming to Malaysia was to meet with her relatives here to ask for their help to solve her family problems back in Hong Kong. Her husband wanted to divorce her and her wrist watch business in Hong Kong was floundering and encountering financial difficulty.

[129] She wanted to borrow money from them and at the same time sought their help to persuade her husband not to divorce her for the sake of their children.

[130] The accused testified that on the 27 March 2010 she came to Penang from Kuala Lumpur by car and stayed at B-Suite Service Apartment in Bayan Baru because taxi service was available there around the clock. The following day on the 28 March 2010 she reached the Penang International Bayan Lepas Airport at about 6am. After checking in together with a piece of her baggage weighing over 25 kilograms, she waited in the airport hall for departure.

[131] While waiting there for her flight departure, the accused noticed an old woman bringing two or three bags including one blue baggage approaching her. The old woman whose face was pale asked for her assistance to carry the blue baggage. The accused gave evidence that at first she did not want to help her but after the old woman showed her passport that she was a Hong Kong resident the accused thought that probably the old woman was also boarding the same flight as hers, thus she agreed to the old woman's request.

[132] After that the accused and the old woman proceeded to the departure hall. The accused was carrying her handbag and the blue baggage belonging to the old woman. Before reaching the main check entrance, her mother telephoned her and she took out her hand phone from her white handbag to answer the call. While talking to her mother, the old woman had already walked ahead of her and entered the departure hall without waiting for her.

[133] After talking to her mother, the accused entered the main check entrance and showed her passport to a staff of the airport and then proceeded to the immigration counter. The accused said that at that time only one counter was open and there was a long queue. She saw the old woman standing in front of the queue and she called her 'Aunty' twice but the old woman did not hear her and after having her passport endorsed by the immigration officer, the old woman walked away from the counter.

[134] As soon as the immigration officer had dealt with her passport, she chased after the old woman frantically and ran towards the rapi scan. In her haste to chase after the old woman, she forgot to put her handbag and the blue baggage onto the X-ray luggage and a police woman reprimanded her for not doing so.

[135] After she had put her handbag and the blue baggage onto the rapi scan and cleared the 'walkthrough', a police man talked something with the police woman and the latter pointed at the blue baggage to the accused. The accused said that she understood the sign language meaning asking her whether the particular blue baggage was hers. She responded in the Cantonese dialect while showing with her finger meaning that an old woman had asked her to bring this baggage from outside and the latter had already entered the departure hall.

[136] The police woman then conducted a body search on her. The accused still pointed to the blue baggage to show the police woman that the said baggage belonged to an elderly woman who had already gone to the departure hall. She testified that the police woman did not understand what she was saying and neither did the police woman understand what she was talking.

[137] The accused further narrated that the police woman looked angry and took away her passport and boarding pass. The police woman then ordered her to take the blue baggage and stand by the side. The accused said that she still explained to the police woman that this blue baggage belonged to the old woman who was already in the departure hall.

[138] The accused said that if there was a police officer who could communicate with her at that time, she would have brought him or her into the departure hall to witness her handing over the blue baggage to the old woman passenger.

[139] While she was standing there, the accused testified that many people witnessed her quarrelling with the police woman. She subsequently saw the police woman contacting someone over the walkie talkie and after five minutes another police woman came to the scene who directed her to take this blue baggage to a small room. In the small room, another police woman came making altogether three police women in the room. Before the room was closed, the accused saw a police man waiting outside the room.

[140] The accused said that she was not satisfied and willing to be brought to the room. She further gave evidence that they first searched her body and then the blue bag and her handbag. They did not find anything unlawful in her white handbag but instead took out oval things fastened together with cellophane tape from the blue bag.

[141] The accused quarrelled with them and told them that the blue bag did not belong to her and she was slapped by one police woman.

[142] The accused denied vehemently that all the drugs were found on her body as they were actually seized from the blue bag. She testified that she was not able to ask for help because her hand phone was taken away from her and she was not allowed to say anything. She was helpless and cried inside the room and they looked angry.

[143] They then ordered her to take her white handbag and the blue bag to the police station while the police man who was standing outside the room took the drugs found inside the blue bag and put them in a red container to the airport police station.

[144] The accused refuted the evidence of PW6 that she had prevented her from searching her body and also denied that she had tried to bribe PW7.

[145] The accused called her relative Siaw Voon Fong ('SD2') and her mother Siew Pat Moy ('SD3') both Malaysians to corroborate the material particulars of her story. SD3 testified that the accused, her relative, had family and financial problems in Hong Kong. The accused stayed with her in Selangor for three days before her arrest and when she came to stay with her, the accused was carrying a handbag and a black baggage containing clothes.

[146] SD3 confirmed that her daughter faced family problem in Hong Kong and she came to Malaysia to seek help from her relatives to solve it. She also said that on the 28 March she did telephone the accused while the latter was at the airport.

[147] After SD3 had finished testifying, the defence closed its case.

SUBMISSIONS — AT THE END OF THE DEFENCE CASE

Accused

Burden of proof

[148] The burden of proof to establish the prosecution case beyond reasonable doubt lies on the prosecution. If there is a reasonable doubt, the accused must be acquitted (*Public Prosecutor v Chia Leong Foo* [2006] 6 MLJ 705).

Defence story

[149] The defence story is credible and a reasonable doubt had been cast on

A the case for the prosecution. The accused had testified that she had come to Malaysia to meet her relatives here in order to discuss with them about her family and financial problem in Hong Kong as depicted in her testimony in court.

B **[150]** The accused gave evidence that SD2 had given her financial aid by sending money to her in Hong Kong. SD2 had given her US1000 dollars.

[151] The accused had testified on affirmation that the blue bag found to
C contain the drugs belonged to an old woman passenger who was also flying to Hong Kong and had asked her help to carry.

[152] The green bag containing clothes (P53) which was produced for the first time during the trial was not the accused's bag which was actually black in
D colour.

[153] Before searching her body, the police women opened the blue bag and rummaged its contents and took out the drugs from it. The accused talked in
E Cantonese dialect that the blue bag belonged to an old woman and pointed outside and quarrelled with them but was slapped. She was not aware of the drugs inside the blue bag.

[154] The accused denied that she had tried to avoid her body being
F searched and she was only wearing one bodysuit and did not know where the bodysuit came from.

[155] The accused did not understand what the police women were saying to
G her and repeatedly told them that the blue bag where the drugs were found did not belong to her. She also denied that no women staff ever spoke in the English language at any time.

[156] Therefore, learned counsel submitted that the prosecution had failed
H to prove its case beyond reasonable doubt against the accused and he should be acquitted and discharged.

PROSECUTION

I *Reasonable doubt*

[157] The learned deputy prosecutor argued that it is settled law that the duty of the accused person at the end of the defence case is merely to cast a reasonable doubt on the prosecution case.

[158] In *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; [1971] 1 LNS 115 it was held:

> … A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

BARE DENIAL

[159] She contended that the defence was a bare denial. The accused testified that as she was walking through the 'Walkthrough' machine she was asked by an old woman to help to carry her bag which contained the drugs. It was not sensible for an airport officer to check the contents of a bag which had whatsoever no connection with the accused. There was no reason for those involved to lie about the source where the drugs were discovered.

[160] She cited the cases of *Chandran a/l Paskaran v Public Prosecutor* [2011] 2 CLJ 585 (CA) and *Razali bin Samani v Public Prosecutor* [2011] 5 MLJ 188; [2010] 9 CLJ 714 (CA) to support her contention.

CLOSE PROXIMITY

[161] The drugs were found attached to the body of the accused, thus there was close proximity. It was argued that in *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197; [1965] 1 LNS 137, 'close proximity was sufficient to find a case to answer'.

LARGE AMOUNT OF DRUGS

[162] The accused was carrying a big amount of drugs and hence it was not possible for self consumption (*Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64).

[163] Therefore the prosecution submitted that the story of the defence could not be believed and the accused had failed to raise a reasonable doubt on the prosecution case. The total evidence had shown that the prosecution had proven its case beyond reasonable doubt and the accused should be convicted of the offence.

COURT FINDINGS

[164] At the end of the defence case, the trial court is bound by the provision of s 182A of the Criminal Procedure Code which states:

(a) at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt;

(b) if the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it; and

(c) if the court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

[165] Thus the court is now duty bound to consider all the evidence adduced during the prosecution case and during the defence stage in order to find out whether the prosecution had proved its case beyond reasonable doubt against the accused.

ISSUE

[166] Whether the drugs totalling 926.71g (786.61g of heroin and 140.1g of monoacetylmorphines) were actually discovered inside a blue bag containing clothes in the light of the facts and surrounding circumstances of the case?

CORE OF THE DEFENCE

[167] The defence had already indicated during the prosecution case that the seized drugs were not discovered on the body of the accused but instead were found in a 'hand luggage' blue bag of clothes box-shaped. The drugs 'ketulan ketulan longgokkan berbentuk bujur yang di tape dengan pelekat tape kertas tersorok dalam satu seluar jeans di dalam beg pakaian berkotak biru tersebut'.

[168] At the defence stage, the accused narrated a full account of what she claimed to have happened at the airport after she had accepted the request from the old woman, a fellow passenger also flying to Hong Kong, to help her carry her 'blue bag of clothes'.

[169] This is actually the basis of the defence.

[170] As the court had already delved into this issue earlier at the close of the prosecution case it will only focus on those facts which had not been raised.

TYPE OF BAG

[171] The accused claimed that the blue bag which was box-shaped and like 'hand luggage' if the court understood it correctly, meaning it could have been carried by hand. In other words, if true, it was not a big bag.

[172] No shrewd drug trafficker would have been so foolish as to put such a

quantity of expensive drugs into such a small bag to run the risk of the drugs being easily detected. Moreover it was also claimed that the drugs were hidden inside a pair of jean with 'paper tape'. Inevitably when such a bag is open, by inserting one hand into it and rummaging the contents, one will easily feel the oval lumps due to the limited space inside it unlike a big bag.

[173] The court also takes judicial notice of the notorious fact that in most cases where drugs are smuggled into or out of a country using a bag usually there will be a secret compartment in the luggage used. Hence it is the belief of this court that such a purported blue bag would not probably be used to traffic the drugs.

[174] If there were such a blue bag PW6 and PW7 would have easily spotted it. PW6 had given evidence that the accused hastily jumped the queue to retrieve her bag from the X-ray luggage PW9 had given evidence to say that there was no such blue bag except for the handbag and P53 belonging to the accused.

[175] The court finds that there was no motive for both of them to fabricate evidence as hinted by the learned defence counsel against the accused. The accused had not produced a shred of evidence to show that both of them had ulterior motive to do so. Their evidence was not inherently improbable. See *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 and the cited Court of Appeal case in *Razali Samani v Public Prosecutor*.

LANGUAGE BARRIER

[176] The accused testified that she had quarrelled with the police women over the true ownership of the incriminating blue bag while there were onlookers. She claimed no English language was spoken and they did not understand her that she was struggling to tell them that the bag belonged to an old woman.

[177] If there were onlookers, whether airport staff or passengers, surely at least there must be a Chinese person among them and she could have easily communicated with him or her regarding her predicament. Besides, the court takes judicial notice that everyday a few Chinese men and women are looking after their business kiosks at the airport, thus the court does not believe that she was telling the truth. She could have easily asked help from them.

MONETARY PROBLEM

[178] It is hard to believe that the accused supposedly faced financial problem would waste her money on transportation and lodging by travelling

all the way from Selangor to Penang to board the aircraft here, bearing in mind that she was not staying in a low budget motel but a service apartment in Penang. She also took a taxi from the apartment to the airport. It would have been more economical for her to take the flight from the Kuala Lumpur International Airport which is nearer to her relatives' home.

[179] The accused did not have to fly all the way from Hong Kong to Malaysia to seek help from her relatives here to solve her family and financial problems if she had really faced financial constraints back home. She could have telephoned them telling them about her personal problems and requested them to send money to her as SD2 had already done before.

[180] To fly to and fro from Hong Kong to Malaysia would have cost her a lot of money not forgetting taxi fares, hotel and food bills.

SD2 AND SD3

[181] Per Ismail Khan J:

> Although there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced to the contrary and the surrounding circumstances (*Balasinghan v Public Prosecutor* [1959] 25 MLJ 193).

[182] The court gives little probative value to both witnesses as both were clearly not telling the truth in court. They were mainly to bolster up the defence of the accused. SD2 had testified that she saw the accused coming to her home with a handbag and a black luggage contrary to all the evidence led by the prosecution witnesses PW6 and PW7. In fact the investigating officer (PW9) had produced a green baggage (P53) belonging to the accused which he took from luggage department at the airport after checking the flight electronic ticket of the accused.

[183] SD3 being the mother to the accused was naturally trying to save her daughter from being convicted of the offence. She testified that when the accused left Hong Kong, the latter was carrying a zipped oval bag belonging to her which she lent to the accused contrary to seizure of P 53.

FALSE DEFENCE

[184] In *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538, the Court of Appeal referred to the Supreme Court case in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 which observed that 'whenever a criminal trial is decided on the basis of the truth of the prosecution case as against the

falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt on the prosecution case. Thus even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case'.

[185] In *Public Prosecutor v Peng Hock Seng* [1980] 1 CLJ 221 it was held that a defence which attempts to throw suspicion (by analogy blame) of possession to another is not proof to the contrary so as to discharge presumption (by analogy raising a reasonable doubt).

[186] The defence story did not raise a reasonable doubt on the prosecution case and based on the aforesaid reasons the accused was found guilty of the offence and convicted. She was then sentenced to death.

Accused sentenced to death.

Reported by Ashgar Ali Ali Mohamed